(4)

No. 91-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

YOUNG & RUBICAM INC.,

Petitioner/Cross-Respondent,

—v.—

BETTE MIDLER,

Respondent/Cross-Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CROSS PETITION

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YOUNG & RUBICAM INC.,

Petitioner/
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v.

BETTE MIDLER,

Respondent/
Cross-Petitioner.

PETITIONER/ CROSS- RESPONDENT'S
BRIEF IN OPPOSITION

Young & Rubicam Inc., respectfully prays that Bette Midler's cross-petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in

this action on September 20, 1991, be denied.

STATEMENT OF JURISDICTION

Young & Rubicam Inc.'s, ("Young & Rubicam") attorneys received a copy of Bette Midler's ("Midler") cross petition for writ of certiorari from the Ninth Circuit's opinion in this case on January 24, 1991.

OPINIONS BELOW

The five opinions below are set forth in Young & Rubicam's petition for writ of certiorari filed December 18, 1991.

STATEMENT OF THE CASE

While respondent Young & Rubicam respectfully refers the Court to its Statement of the Case in its petition for certiorari, dated December 18, 1991, Young & Rubicam hereby wishes to correct certain misstatements in petitioner Bette Midler's

cross-petition.

First, Young & Rubicam contends that the evidence at trial demonstrated that Young & Rubicam intended to imitate Bette Midler's version of "Do You Want To Dance", not that "Young & Rubicam designed the advertisements to convey the impression that Bette Midler was singing for their commercial." (Cross Petition at 6.)

Midler states that the District Court granted Young & Rubicam's motion for partial summary judgment without any discussion of alleged evidence of Young & Rubicam's fraudulent conduct. However, the District Court did not address evidence of fraudulent conduct because Midler did not submit any evidence of fraudulent conduct to District Court. Midler's "fraud" argument was a last ditch effort that first arose in response to defendant's motion for partial summary judgment. In any event,

plaintiff's complaint contained mere boilerplate allegations of fraud and did not allege misrepresentations that created an inference of fraud.[1]

The District Court properly determined that the facts before it did not state a claim for punitive damages based on either malice or fraud and granted summary judgment. The Court of Appeals did not address plaintiff's new fraud argument in its opinion. (App. at A1).

REASONS TO DENY THE WRIT

The District Court's decision to grant summary judgment on Midler's punitive damages claim was decided correctly under Celotex v. Catrett, 477 U.S. 317 (1986). The Ninth Circuit's decision to uphold the

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[1] See E.R. 7 at ¶25, 8 at ¶3. Citations to the Excerpts of Record before the Ninth Circuit in Midler II are in the form E.R. at __. Citations to the appendix contained in Young & Rubicam's Petition for Certiorari are in the form (App. at A__).

grant of summary judgment on the issue of punitive damages was rightly decided under California law and does not address or affect in any way the question of whether fraud can be the basis for an award of punitive damages under California law.

POINT I

MIDLER DID NOT STATE A CLAIM FOR FRAUD UNDER CALIFORNIA LAW WHICH COULD WITHSTAND SUMMARY JUDGMENT

Midler states that her complaint contained allegations of fraud sufficient to withstand summary judgment. However, plaintiff did not (and could not) allege she was in any way misled by or relied on representations made in the commercials, and thus plaintiff could not establish a

cause of action for fraud under California law.[2]

Midler argues that similar allegations of "fraud upon the public" formed the basis for punitive damages in Cher v. Forum International, 692 F.2d 634 (9th Cir. 1982); National Bank of Commerce v. Shaklee Corporation 503 F. Supp. 533 (W.D. Tex 1980), and in Glovatoruim Inc. v. NCR Corporation, 684 F.2d 658 (9th Cir. 1982), and thus the misrepresentations she claimed resulted from the broadcast of the commercial did state a claim.

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[2]"To establish a cause of action for fraud under California law, plaintiff must prove: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damages . . . . All of these elements must be present if actionable fraud is to be found; one element absent is fatal to recovery." Okun v. Morton, 203 Cal. App. 3d 805, 828, 250 Cal. Rptr. 220, 234-35 (1988) (emphasis in original).

Midler cites National Bank of Commerce v. Shaklee Corporation, 503 F. Supp. 533 (W.D. Tex. 1980), in support of her assertion that punitive damages may be awarded to a plaintiff based on defendant's misrepresentations even if plaintiff did not believe the misrepresentations and did not rely on them. Midler falsely claims that Shaklee was decided under California law. As the decision clearly states, Texas law governed plaintiff's claim.

Defendants in Shaklee put advertisements for their products throughout a special promotional copy of plaintiff's book and stated that plaintiff was a member of their sales force. While the court awarded $100,000 in compensatory damages and $35,000 in exemplary damages, contrary to plaintiff's suggestion, the exemplary damages were not based on the creation of a suggestion that plaintiff was

"associated" with defendant's product; exemplary damages were based on advertisement copy "authored by" defendant which expressly, and falsely, stated that plaintiff had become part of defendant's sales force. Shaklee, 503 F. Supp. at 537. Nonetheless, Shaklee is wrongly decided. Defendant Shaklee apparently was not aware that its use of plaintiff's name and book were not authorized. Id. Defendant's intent to associate its product with plaintiff cannot be a basis for an award of punitive damages under Texas law if defendant believed it was authorized to make that association. Cf. Ware v. Paxton, 359 S.W.2d 897 (Tex. 1962) (to justify punitive damages defendant's act must "partake . . . somewhat of a criminal or wanton nature").

Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982), which is also cited by Midler and which actually was decided under California law, does not even mention California Civil Code Section 3294 and is readily distinguishable from the instant action. In Cher, the Court found that defendant used plaintiff's photograph and name in advertisements that were "patently false" and published those advertisements with knowledge that they were false or with reckless disregard of their truth. The advertisement in question suggested that Cher read and endorsed Forum Magazine and stated that Cher would tell Forum things about her love life that she would not tell US Magazine. In fact, Forum knew that Cher had given the interview referred to in the ad to its competitor, US Magazine. Forum purchased the script from the writer who had conducted the interview

when US decided not to run the piece. Exemplary damages were appropriate because the advertisements at issue were patently false and defendants clearly intended to make the patently false statements. Midler's conclusion that the Cher court approved punitive damages based on Section 3294(c)(3) is unfounded. Forum's knowing publication of patently false statements is more appropriately considered malice, a "willful and conscious disregard" of Cher's rights justifying exemplary damages under Section 3294(c)(1).

Midler's reliance on the holding in Glovatoruim Inc. v. NCR Corporation, 684 F.2d 658 (9th Cir. 1982) is surprising, given that Section 3294 was amended following that opinion. Civil Code Section 3294 was amended in 1987 as part of the Willie L. Brown, Jr. - Bill Lockyer Civil Liability Reform Act of 1987 in response to

the overly casual and generous approaches of juries and judges to punitive damages. The definitions of "malice" and "oppression" were made more stringent and the requirement of proof by "clear and convincing evidence" was added.

The heightened evidentiary requirement of "clear and convincing evidence" is a significant constitutional limitation. Reader's Digest Association v. Superior Court, 37 Cal. 3d 244 (1984). The "clear and convincing" standard now embodied in Civil Code Section 3294 has long existed elsewhere in California statutory and case law. See, e.g., California Evidence Code Section 115.

> 'Clear and convincing evidence requires a finding of high probability'. (In re Angela P.) (1981) 28 Cal. 3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].) Such a test requires that the evidence be 'so clear as to leave no substantial doubt'; sufficiently strong to command

> the unhesitating asset of every reasonable mind.' (Sheehan v. Sullivan (1899) 126 Cal. 189, 193 [58 P. 543].

Lillian F. v. Superior Court, 160 Cal. App. 3d 314, 320 (1984).

Midler's assertion that she may seek punitive damages based on fraud under Section 3294(c)(3) even though she was not defrauded would require a significant departure from the common law of fraud.

In the absence of any factual support for the assertion that Young & Rubicam intended to commit fraud when it created the commercial, Midler's claim for punitive damages based on the violation of her right of publicity required proof that Young & Rubicam acted with "malice or oppression" when it created the commercial. But as the court below correctly determined, and as plaintiff now concedes, there is no evidence to suggest that defendant acted

with any "evil motive" and, therefore, punitive damages are not available.

POINT II

THE DISTRICT COURT PROPERLY FOLLOWED THE CELOTEX STANDARD

Midler also claims that the District Court erred in dismissing Midler's fraud claim. However, the District Court followed Ninth Circuit law in granting summary judgment to Young & Rubicam. The Ninth Circuit has described the parties' burdens on a motion for summary judgment:

> . . . [W]ith respect to an issue on which the nonmoving party will bear the burden of proof at trial, the moving party is not required to produce evidence showing the absence of a genuine issue of material fact. "Instead, . . . the burden on the moving party may be discharged by 'showing' - that is, pointing out to the evidence to support the nonmoving party's case." [Celotex Corp. v. Cartrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986)]. Once the moving party shows the absence of evidence,

> the burden shifts to the nonmoving party to designate "'specific facts showing that thee is a genuine issue for trial.'" Id. at 2553 (quoting Fed. R. Civ. P. 56(e)).
>
> The nonmoving party may not rely merely on the unsupported or conclusory allegations of her pleadings. Fed.R.Civ.P. 56(e); [citations omitted]. If the non-moving party fails to make a showing sufficient to establish that there is a genuine issue of fact with respect to the disputed element of the party's case, then summary judgment is appropriate. Celotex, 106 S.Ct. at 2552-53 . . . .

Coverdell v. Dept. of Social & Health Services, 834 F.2d 758, 769 (9th Cir. 1987). Young & Rubicam was entitled to summary judgment on Midler's claim for punitive damages because Young & Rubicam did not commit a fraud, there is no evidence to suggest that defendant intended to harm Midler and Young & Rubicam did not and could not willfully and consciously disregard Midler's rights based on conduct

which did not violate any rights recognized under California law prior to Midler I.

CONCLUSION

For the foregoing reasons, Respondent Young & Rubicam respectfully requests that Petitioner Bette Midler's cross-petition for a writ of certiorari be denied.

Dated: New York, New York
February 21, 1992

Respectfully Submitted,

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